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## THE ROLE OF HEARSAY IN A RATIONAL SCHEME OF EVIDENCE

George F. James\*

EARLY in the nineteenth century Jeremy Bentham directed his considerable analytical powers toward the common law rules of evidence to discover to what extent they were adapted to their apparent purpose—the discovery of truth. His conclusion was bitter,

“That the system, taken in the aggregate, is repugnant to the ends of justice; and that this is true of almost every rule that has ever been laid down on the subject of evidence.”<sup>1</sup>

This reaction is almost the inevitable result of what Bentham described as the “theorem” of his treatise:

“The theorem is this: that, merely with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded: for that although in certain cases it may be right that this or that lot of evidence, though tendered, should not be admitted, yet, in these cases, the reason for the exclusion rests on other grounds; viz. avoidance of vexation, expense, and delay.”<sup>2</sup>

Bentham’s analysis produced results both practical and theoretical. For the former, the half century after his death saw the abolition of many of the dis-

qualifications of witnesses against which he had directed some of his most virulent attacks. For the latter, Thayer’s point of view, and directly or through Thayer the spirit of Wigmore’s treatise, owe much to Bentham’s works. However, neither Thayer nor Wigmore adopted Bentham’s attitude of wholesale enmity toward the rules of evidence. Thus, Thayer, although he suggests as a “main rule” of evidence “that whatsoever is relevant is admissible,”<sup>3</sup> elsewhere states with reference to our voluminous and complex system of exclusionary rules:

“The few principles which underlie this elaborate mass of matter are clear, simple, and sound.”<sup>4</sup>

Similarly Wigmore, though sharply critical in many particulars, has written:

“. . . the present rules as a whole are *sensible ones*. Taking each of them in the big, there is hardly one that is not based on some aspect of human nature, which needs some such a rule of warning.”<sup>5</sup>

At the extreme of admiration we find Greenleaf, who writes at the close of his first volume on Evidence:

“Having thus completed the original design of this volume, in a view of the

at all, ultimately on the necessity that trials must be concluded within limited time.

<sup>3</sup> Thayer, *Preliminary Treatise on Evidence at the Common Law* (Little, Brown, and Company, 1898) 523.

<sup>4</sup> *Id.*, at 511.

<sup>5</sup> Wigmore, *Evidence* (Little, Brown, and Company, 1923) 127.

\* Ph.B. 1930, J. D. 1932, University of Chicago; LL.M. 1934, Columbia; Assistant Professor of Law, University of Chicago Law School.

<sup>1</sup> Bentham, *Rationale of Judicial Evidence* (Hunt and Clarke, London, 1827) 21.

<sup>2</sup> *Id.*, at 1. The writer has heard Professor M. J. Adler express the same view:—that all exclusionary rules rest, so far as they are sound

Principles and Rules of the Law of Evidence, understood to be common to all the United States, this part of the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor, from the manner of treatment; and will rise from the study of its principles convinced, with Lord Erskine, that 'they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life'.<sup>6</sup>

So thoroughly had the arguments for and against most of the exclusionary rules been analyzed and evaluated by earlier writers that in 1922, when the Commonwealth Fund supported a critical investigation of the law of evidence by a committee of most of the distinguished living authorities, under the chairmanship of Professor Morgan, the committee decided not to discuss the entire field or to re-examine *a priori* arguments, but to confine itself to an empirical examination of such specific reforms as were susceptible of this treatment. This decision was placed upon three grounds: that the rules of evidence were "sound on the whole," that only a few could be subjected to empirical tests, and that only piecemeal and specific changes could possibly be obtained anyhow.<sup>7</sup> Subsequent experience has shown that even piecemeal and specific changes are not easily ob-

tained in courts of law or from the legislatures.<sup>8</sup>

But since the nineteen twenties a major development in the law justifies a complete reappraisal of the law of evidence. While administrative boards were by no means unknown prior to the market crash of '29, in the past decade their tremendous rise in practical importance is the outstanding feature of the field of procedure. One important consequence is that there is now a great body of litigation of utmost importance, involving frequent appeals to the courts, in which the existing evidential precedents, "the petty details and infinitesimal absurdities with which the rules of evidence have been elaborated"<sup>9</sup> are not binding.

Indeed, certain of the statutes granting quasi-judicial powers to administrative boards appears to provide for hearings characterized by completely "free proof." However, they have not been so construed. The freedom of investigation is commonly held to be limited by a somewhat vague principle expressed in a leading case as follows:

"But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."<sup>10</sup>

With this criterion to apply, how then do we determine which are the "essential rules"? Clearly judicial precedents

<sup>6</sup> Greenleaf, Evidence (Sixteenth Edition, by J. H. Wigmore, Little, Brown, and Company, 1899) §584. The same passage also is found at the close of each edition of Taylor on Evidence, a leading English work based upon Greenleaf.

<sup>7</sup> Morgan et al, The Law of Evidence (Yale University Press, 1927) xlii.

<sup>8</sup> Morgan and Maguire, Looking Backward and Forward at Evidence (1937) 50 Harv. L. Rev. 909.

<sup>9</sup> Wigmore, Evidence 127.

<sup>10</sup> Interstate Commerce Commission v. Louis-

ville & Nashville Railroad Co., 227 U. S. 88, 93 (1913). Perhaps even more suggestive is the phraseology of Judge Hough in *John Bene & Sons v. Federal Trade Commission*, 299 Fed. 468, 471 (C. C. A. 2d, 1924): "We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done." (Italics supplied.)

will not prove particularly helpful. Practical experience might be the best criterion for selecting "essential" rules of evidence but for the fact that on most problems such experience is wholly lacking. There are usually no comparable bodies of data obtained or obtainable under existing rules and under a system operating without these rules. In most cases the only possible solution must be sought in a *a priori* argument. It is hoped that this paper may shed some light upon one corner of the field of evidence, and that it may even suggest an approach toward the entire subject.

## II

Let us start where Thayer started, with the proposition "that whatsoever is relevant is admissible" unless sound cause can be shown for its exclusion. Here the term "relevant" is itself somewhat ambiguous. As Michael and Adler have argued, the word can hardly be given a strict logical meaning.<sup>11</sup> As a matter of logic an item of evidence is relevant to a desired conclusion only in terms of some (usually unexpressed) generality connecting the two. It is always possible to imagine a general proposition which can form the logical nexus between the evidence and the conclusion. On the assertion of such a general proposition any logical difficulty vanishes. The only remaining problem is whether the trier of fact will accept the suggested generalization as sufficiently probable to make the line of

proof persuasive, the probability of the generalization being determined by expert evidence or by the practical knowledge of the court. Formal logic cannot determine such a question. On the other hand, rules of law and that most extraordinary concept, "legal relevance," are even less helpful. One need only examine Sir James Stephen's irritating treatment of hearsay as "relevant" and "irrelevant"<sup>12</sup> to develop a strong aversion to any discussion of relevance which seeks to include purely legal criteria. The solution is apparently to regard relevance in forensic proof neither as a lawyer's nor as a logician's but as an ordinary man's concept, depending on whether the ordinary man, in making decisions in his own affairs, would regard the offered evidence as having some tendency to increase the apparent probability of the proposition sought to be proved. Although on its face such a test may seem unduly vague, it should present no difficult problems in application. To quote Professor Adler again, offers of truly irrelevant evidence are almost unknown. They will occur, rarely, as part of a line of proof known by the advocate to contain a concealed fallacy, and sometimes as the result of mere carelessness or mistake.<sup>13</sup>

The next inquiry relates to the possible grounds for excluding relevant proof. In the writer's opinion, there are only four.<sup>14</sup> (a) Evidence may be excluded because, although relevant, its probative force is too slight to justify

<sup>11</sup> Michael and Adler, *The Trial of an Issue of Fact* (1934) 34 Col. L. Rev. 1224, 1462.

<sup>12</sup> Stephen, *Digest of the Law of Evidence* (MacMillan and Company, 1876) c. IV.

<sup>13</sup> The reference is to a remark made in con-

versation; Professor Adler may have taken the same position in print.

<sup>14</sup> Rules based on policies extraneous to the problems of proof, such as the attorney-client privilege, are left out of account.

the time and expense to be spent in receiving it.<sup>15</sup> (b) It may be rejected because, although it has substantial probative value, it also has such a tendency to prejudice or to confuse that its use would probably do more harm than good.<sup>16</sup> (Some might extend this principle to exclude possibly misleading evidence which the trier of fact is deemed incapable of evaluating properly, lest it be given undue weight.) (c) It may be excluded because it may be false, and because the opposite party could not be prepared to meet and rebut it.<sup>17</sup> (d) Evidence may be excluded because it is inferior to other evidence which could have been produced, so that the non-production of the better creates a suspicion concerning the worse.<sup>18</sup>

Turning at long last to the subject of hearsay, it can be and indeed has been argued that hearsay, or most hearsay, is excluded because it is irrelevant.<sup>19</sup> Little thought is required to see that if irrelevant means having no tendency to increase the apparent probability of the proposition sought to be proved, hearsay is neither relevant nor irrelevant, but, like any other species of evidence, sometimes relevant and sometimes irrelevant. The point has been established so long that it need not be labored.<sup>20</sup> Irrelevance, used as a basis for the general exclusion of hearsay, must mean "legal irrelevance." This

<sup>15</sup> As in the collateral issue rule, where rightly applied.

<sup>16</sup> An example is the rule excluding proof of a criminal defendant's prior conviction of an infamous crime.

<sup>17</sup> The rule excluding proof of bad character by evidence of particular wicked acts, not pleaded, illustrates this principle.

<sup>18</sup> The familiar best evidence rule, requiring documentary originals where available.

argument is question-begging, and may be vicious in its consequences.

Many cases give as a reason for the rule excluding hearsay the often-quoted statement of Chief Justice Marshall:

"Hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its inherent weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."<sup>21</sup>

In part this dictum supports the "better evidence" theory, considered below. But in part it suggests as a reason for its exclusion that the probative force of hearsay is too slight to justify giving it time at trial.

At an early date the "inherent weakness" of hearsay was regarded as springing primarily from the lack of an oath.<sup>22</sup> When the modern witness had but recently appeared upon the scene of litigation, when the trial by compurgation of an earlier day was still, in theory at least, part of the legal system and when the spiritual sanction may have been more effective than today it was reasonable to attach considerable importance to the ceremony of swearing. As a consequence, it became settled first that hearsay, standing alone, was not *sufficient* evidence of a material fact and later that it

<sup>19</sup> Stephen, *op. cit. supra*, note 12.

<sup>20</sup> Starkie on Evidence (J. & W. T. Clarke, 1824) §XXVI.

<sup>21</sup> *Mima Queen and Child v. Hepburn*, 11 U. S. 290, 295 (7 Cranch, 1813).

<sup>22</sup> Phipson on Evidence (Sweet & Maxwell, Limited, 1930) 217, and cases cited; See also Gilbert on Evidence (2d. Ed., London, 1760) 152 for a contemporary view.

should not be received at all.<sup>23</sup> Today, and indeed for at least a century,<sup>24</sup> the importance of the oath has suffered a sharp decline in common estimate; in its place the lack of cross-examination is cited as the basis for hearsay exclusion. This shift in emphasis appeared in judicial opinion early in the eighteenth century;<sup>25</sup> today the most authoritative writer declares the lack of cross-examination to be the essential defect in hearsay testimony. Now it may be true that unsworn declarations are less reliable than testimony given under oath. And it may be true that cross-examination is an extremely useful check on faulty memory or wilful deceit. Neither of these propositions justifies the general exclusion of hearsay. To justify general exclusion on the ground of "inherent weakness" one must say that all hearsay is so utterly unreliable that in no case does its value justify the time and expense attendant on its use.

This raises the question of the basic testimonial hypothesis. Do we believe, with the hasty David, that all men are liars? Then it is reasonable to exclude all men's testimony unless it be given in view of the trier of fact, under the danger of criminal penalties and in the fear of hell-fire, and subject to the searching test of cross-examination. Indeed, the depravity of man was once so fully accepted that even under these conditions interested parties were spared the temptation to perjury. To-

day the law takes a more optimistic view of human nature. Few, it is submitted, really believe that *all* men are liars. In most cases people tell the truth as they see it, and although their perception, understanding and recollection may be subject to error, this possibility of error is not so high as to bring the average of truth in all ordinary out-of-court statements of fact down as low as or even very nearly as low as fifty per cent. If this be true, general exclusion of hearsay cannot be justified on its lack of substantial evidentiary value.

Starkie, a most discriminating writer, discussed this difficulty without being able to suggest a satisfactory explanation for the generally accepted rules. After pointing out the weakness of hearsay as compared with testimony based upon the speaker's own knowledge, he continued,

"but, it may be asked, since evidence of the declaration of a person whose veracity is unimpeached would have *some* tendency to convince the mind, where the fact disputed is otherwise doubtful, why is not such evidence at least *admissible*, leaving its *effect* to be considered by the proper tribunal. To take a strong case: suppose that A., a person of undoubted credit, had asserted that he saw B. inflict a mortal wound upon C., a party who knew A. to be a man of the strictest veracity, and who was also convinced that he had gravely made that assertion, would necessarily attach some degree of credit to it, and its effect might be to turn the scale, and to create in his mind a conviction of the truth of the fact of which he might

<sup>23</sup> Phipson on Evidence, 217, and cases cited; Wigmore, Evidence, §1364, tracing the development at length.

<sup>24</sup> See Bentham's attack on the oath as a guaranty of veracity in his Rationale of Judicial Evidence, 1827.

<sup>25</sup> Phipson gives 1716 as the year "when the

exclusion of hearsay is apparently for the first time put, not alone upon the old ground that the original speaker was not upon oath, but also upon the more modern one, that the other side had no opportunity for cross-examination (2 Hawkins, Pl. Cr. 596-7)." See also Wigmore, Evidence §1364.

otherwise have doubted. In such a case therefore, if A. be dead, and B. be charged with the death of C., why should not the declaration of A. be admitted in evidence? It may be answered, that the law must proceed by general and by certain rules. If, therefore, the mere declaration of A. in this case were to be admitted, it would follow that the declaration of every other person, with respect to every other disputed fact, would also be admissible. The consequence would be to let in numberless wanton, careless, and unfounded assertions, unworthy of the least regard. The principle would extend to all the loose, idle, and contradictory conversation that had taken place upon the subject in dispute, to none of which any degree of credit could safely be attached; and, above all, the evidence would be wholly unsupported by those tests of truth which the law in general requires; it would not rest upon the obligation of an oath; there would be no certainty, either as to the means of knowledge, or as to the faithful transmission by the asserting party of that which he knew. Another reason for the rejection of such evidence arises from the nature and constitution of the tribunal whose minds are to be convinced. If it were to be assumed, that one who had long enured to judicial habits might be able to assign to such evidence just so much, and no greater credit than it deserved, yet, upon the minds of a jury unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the common concerns of life, to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard, when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated;

their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biased by the character of the person from whom the evidence was derived. In addition to this, since everything would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral issues.

Upon these grounds it is that the mere recital of a fact, that is, the mere oral assertion, or written entry by an individual, that a particular fact is true, cannot be received in evidence."<sup>26</sup>

Thus Starkie raises the problem, but the keystone in his answer is faulty. "If, therefore, the mere declaration of A in this case were to be admitted, it would follow, that the declaration of every other person, with respect to every other disputed fact, would also be admissible." Why? Because "the law must proceed by general and by certain rules." Such a contention is contrary to elementary observation. Starkie himself, after basing the general exclusion of hearsay on the ground that *much* hearsay is unworthy of the least regard and that therefore all hearsay must be excluded so that the law may proceed by general and by certain rules, goes on for some thirty pages to discuss exceptions to the rule and special situations in which it is not applicable. In Wigmore's more careful and exhaustive treatise the full flower of the generality and certainty of the nineteenth century rules of evidence stands revealed: a principle of hearsay exclu-

<sup>26</sup> Starkie on Evidence 44-46.

sion uncertain in scope and subject to fourteen arbitrary and ill-defined exceptions, seldom well understood by advocate or judge.<sup>27</sup> If this is what courts really do, the judicial rules of exclusion can hardly be sustained by the principle of certainty and generality invoked by Starkie. Nor does the principle fare better when considered as part of an ideal system. The most such a principle can require is that similar cases be decided alike, by known and inflexible rules; it cannot give the criteria of similarity in cases. It would be as reasonable to insist that generality and certainty require all killings to be punished as murder or all promises to be enforced as contracts as on this basis to require that all hearsay be excluded as untrustworthy. If some hearsay has, and other hearsay lacks adequate reliability, the question should be, "What criteria can we use to divide the good from the bad?"

Once the possibility of rejecting some offers of hearsay and accepting others is recognized, Starkie's arguments operate at most to exclude *some* hearsay on the basis of the second possible ground suggested above—that *some* hearsay is too prejudicial, or too confusing, or too difficult to evaluate to justify its use. As for any strictly prejudicial effect, hearsay appears to stand upon the same basis as any other evidence. It may or may not be unduly prejudicial. If it is,

it should be excluded for the same reason and under the same circumstances as other testimony. For example, if it is objectionable to prove the bad character of a criminal defendant, such evidence should be excluded whether it is in the hearsay form of general bad reputation or in the form of prior convictions for infamous crimes.

The contention that hearsay — or some hearsay — cannot properly be evaluated by a common law jury seems highly questionable to this writer. Starkie suggests that jurors, because accustomed to relying on hearsay in the common concerns of life, would be unable to reduce such evidence to its proper standard when placed in competition with more certain and satisfactory evidence. It seems more likely that this comparative evaluation of hearsay as against direct evidence is one of the things all persons do in their common concerns. The weakness of rumor, the possibility of error in repetition and the likelihood that persons subjected to no effective check will lie in their own interest are matters of common observation. Granting that judges hear more evidence and participate in the decision of more doubtful questions of fact than do members of the general public, all persons do it more or less, and it is in no sense peculiarly a judicial technique.<sup>28</sup>

But if one were to grant that the

<sup>27</sup> A rule more general and certain than the present hearsay exceptions has been suggested, which would accommodate Mr. Starkie's "strong case." See Morgan et al, *The Law of Evidence*, c. IV.

<sup>28</sup> Bentham's remarks on this point in connection with the use of "second degree hearsay" are still appropriate:

"transmitted evidence purporting to have passed through more media than one, may still be received, whatsoever be the number of such

media: to wit, in every case in which make-shift evidence transmitted through no more than one medium would be received; always under the same conditions and restrictions. . . .

The main and most striking reason is, that, by the alleged increase in the number of the media, no new facility is given to fraud. On the contrary, it can never answer the purposes of fraud, it would be unfavourable to the purposes of fraud, falsely, or even truly, to represent any such increase. That assur-



common law jury should not be trusted with any but the most reliable hearsay—such as the statements of an identified declarant having no motive to deceive—the point is not strictly relevant to the present subject. The ground for exclusion, the supposed incapacity of the ignorant and unskilled juror to deal with testimony of varying probative value, should have no application to the commissioner or trial examiner, a professional hearer of disputes like the common law judge and unlike the common law judge a specialist in a particular field. We cannot deduce from the traditional stupidity of the juror one of the “essential rules of evidence” to bind an expert fact finding body.

The third possible ground suggested for the exclusion of relevant evidence was that some evidence is so difficult to meet and rebut that its use is unfair. A specific illustration, perhaps the only one commonly encountered in practice, is the rule excluding proof of bad character by evidence of specific bad acts. Were the rule otherwise a damaging collateral issue could be raised at trial, which the pleadings would in no way have suggested. It would be almost impossible to prepare in advance to repel such an attack, whether it was wholly

fabricated or based upon distortion of an actual occurrence. On the other hand, while there may be some practical difficulty in defending against a case based in part or wholly on the repeated statements of persons not available for cross-examination, this is a difficulty of another order. The issues to be tried are not concealed as a result of the admission of such testimony, and unless a case or defense has been fabricated with extraordinary skill other evidence will be available to rebut unsound conclusions, whether based upon intentional falsity or upon error or incompleteness, arising from the repetition in court of statements not subjected to cross-examination.<sup>29</sup> While the point that hearsay is always difficult to meet is perhaps the strongest one which can be made in support of general exclusion, in the writer's opinion it falls a trifle short of carrying conviction.

Of the possible grounds originally enumerated for the exclusion of evidence there remains only the principle of the “best evidence.” Although today its operation is virtually restricted to a preference for the use of the original in the proof of the contents of a document, it was once treated as a rule

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ance of correctness cannot but be diminished in proportion to the number of media the evidence has passed through, is a truth, the force of which cannot but be felt by every mind to which it is presented. But a man actuated by fraud, intending deception, to be brought about by mendacity, will of course give to the information the most plausible, the most trustworthy, form, of which it is susceptible: he will never spontaneously and unnecessarily multiply causes of untrustworthiness and distrust in regard to it. The danger of fraud (i.e. of deception by fraud) not being increased by the number of supposed media; there remains the danger of incorrectness, i.e. of deception by incorrectness. But in this case, in whatsoever propor-

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tion the danger of incorrectness may be thus increased, the danger of deception does not increase with it: for, whatsoever be the danger of incorrectness, it is apparent to every eye, upon the very face of the evidence: apparent to all eyes alike, and in no danger at all of being set down at any value below its real value. . . . 4 Bentham, op. cit. supra, note 1, at c. X. And see to the same effect the letter of a Boston lawyer quoted in Morgan, op. cit. supra, note 7, at 44.

<sup>29</sup> It should be noted that today hearsay is sometimes admitted *because* there can be no other proof of the fact in issue, thus aggravating the danger that this evidence may be false and proof against effective rebuttal.

of great importance—one of the first principles of evidence. Thus Sir Geoffrey Gilbert's treatise, first published in 1754, states:

"The first therefore and most signal Rule, in Relation to Evidence, is this, that a man must have the utmost Evidence, the Nature of the Fact is capable of: For the Design of the Law is to come to rigid Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of; less Evidence doth create but Opinion and Surmise, and does not leave a Man the entire Satisfaction, that arises from Demonstration; for if it be plainly seen in the Nature of the Transaction, that there is some more Evidence that doth not appear, the very not producing it is a Presumption, that it would have detected something more than appears already, and therefore the Mind does not acquiesce in any thing lower than the utmost Evidence the Fact is capable of."<sup>30</sup>

This best evidence principle was at the very least one of the basic elements in the early development of the rule of hearsay exclusion.<sup>31</sup> Even after the rule had congealed into approximately its

present form the best evidence notion still appeared as a partial or complete justification. Thus Starkie, while treating hearsay as a distinct head, also gave as an illustration of the best evidence rule that

"no declaration or entry by any person can be given in evidence where the party who made such declaration or entry can be produced and examined as a witness."<sup>32</sup>

And Greenleaf, the standard nineteenth century authority, quotes Chief Justice Marshall<sup>33</sup> in giving as one basis for the rule that

"this species of testimony supposes something better, which might be aduced in the principal case. . ."<sup>34</sup>

The difficulty with this treatment of hearsay as received and excluded in courts of common law is obvious. In other situations secondary evidence is regularly admitted where the "best evidence" is unavailable. Yet the law does not freely permit proof of the declaration even of deceased persons, to say nothing of persons whose testimony is unavailable for less conclusive rea-

<sup>30</sup> The Law of Evidence, by a late Learned Judge (Gilbert, C. B.) (London).

<sup>31</sup> "The true historical nature of this rule (of hearsay exclusion) is hinted by the remark of an English court, two centuries ago and over, when they checked the attempt of a woman to testify what another woman had told her. 'The Court' it was quietly remarked, 'are of the opinion that it will be proper for Wells to give her own evidence.'"

Thayer, op. cit. supra, note 3, at 518.

The full passage reads as follows:

"Do you know whether Mrs. Wells keeps any cattle?—She keeps a horse and a hog. How long have you known her?—I have known her almost forty years; ever since I can remember.

With what did she use to feed her horse?—I have seen them fetch grains; and I know she bought hay, for I saw it brought in, and by the badness of the weather it was spoiled. When was it brought it?—In the seasonable time of hay-making, before last Christmas was twelve-month.

Where did she put it?—As she said then, she put it into the room called the shop.

Mr. Nares. I object against that, as legal evidence.

Mr. Davy. I am not asking anything Mrs. Wells said since 1752, but what she said before, when it was impossible for her to know of this affair, when it could serve no purpose to speak falsely; that is evidence.

Mr. Nares. There is one plain rule as to the evidence of hearsay; that is, that when you can have that very person that proves this very fact she is the person to be called; this is not evidence at all.

Court. The Court are of opinion that it will be proper for Wells to give her own evidence. . ."

Trial of Elizabeth Canning, 19 How. St. Tr. 283, 406 (1754). This form of ruling excluding hearsay was common. See, e.g., Pickering v. Barkley, Vin. Abr. "Evidence" p. 6, 1, vol. x11, 175 (1673); Ireland's Trial, 7 How. St. Tr. 79, 105 (1678); Busby's Trial, 8 How. St. Tr. 525, 545 (1681).

<sup>32</sup> Starkie on Evidence, 390.

<sup>33</sup> In *Mima Queen v. Hepburn*, 11 U. S. 290, 295 (7 Cranch 1813).

<sup>34</sup> Greenleaf, Evidence §98.

sons. As early as the seventeenth century declarations of persons since deceased were generally excluded.<sup>35</sup> Greenleaf attempted explanation by the statement:

"Hearsay evidence is uniformly held incompetent to establish any specific fact, which, *in its nature*, is susceptible of being proved by witnesses who can speak from their own knowledge."<sup>36</sup>

With all respect to a prolific and influential, if none too thoughtful, writer, this explanation fails to explain. The proper criterion, the criterion applied in all other applications of the best evidence rule, is not the best evidence which, *in the nature of the fact to be proved*, could ordinarily be offered to prove it. It is the best evidence which, under the circumstances of the case at bar, this particular litigant could be expected to present. If the "best evidence" theory for the exclusion of hearsay is accepted, and it is submitted that in cases before expert fact finding bodies there is no other satisfactory theory,<sup>37</sup> some hearsay rule may be justified as one of the "essential rules of evidence," but decidedly not the presently existing rule.

### III.

It remains only to consider the extent to which the exclusion of hearsay is justified by the principle here advocated, and in this connection a brief recapitulation of the principle itself may be justified. It may be cast in two somewhat different, but by no means wholly dis-

tinct, forms. First, as Starkie suggests, there is something quite suspicious about one who offers a purported copy of a document in evidence when the original is available to him; one may fairly wonder whether the copy is a true and perfect one. Similarly, one cannot but wonder, no cause being stated, whether a litigant who prefers quoting a material witness to calling him does not do so out of desire to avoid full disclosure. Or, to present substantially the same idea in a slightly different form and without pointing the finger of accusation, it may be said that every judicial body worthy of the name is interested in reaching a sound decision based on understanding of the actual facts in issue.<sup>38</sup> Having this point of view, a tribunal would naturally insist on being allowed to hear and to see the most cogent and reliable evidence available. There is nothing in either view to support the exclusion of hearsay except when no satisfactory reason appears for use of the repeated declaration instead of the personally presented testimony of the declarant.

Application of this principle would result in admission of hearsay more freely than under the unanimous or even under the majority recommendation of the committee for the Commonwealth Fund.<sup>39</sup> Any ground of unavailability would suffice, and even the good faith of the declarant would go only to probative value and not to admissibility. This last point is particularly im-

<sup>35</sup> See cases collected in Wigmore, Evidence, §1364.

<sup>36</sup> Greenleaf, Evidence, §98. (Italics supplied.)

<sup>37</sup> The writer wishes here to reiterate that in his personal opinion the conclusions of this paper are equally valid for jury trials.

<sup>38</sup> This approach of course assumes that liti-

gation is more than a stately and traditional game played to induce a desirable frame of mind in the eventually unsuccessful suitor.

<sup>39</sup> Morgan et al, op. cit. supra, note 7, at c. IV. It should of course be noted that the recommendations of Professor Morgan's Committee were designed at least to include, and perhaps primarily for, jury trials.

portant in cases in which it might be helpful to use statements of unidentified persons; for example, there might be situations not covered by the common law precedents in which community reputation would be of aid. Here specific findings of good faith could hardly be used.

Another situation in which the "best evidence" principle, by analogy, would lead to the use of evidence inadmissible both at common law and under the recommendations of the Commonwealth Fund Committee was recently suggested by Chairman Madden of the N.L.R.B.<sup>40</sup> It may often happen that definite proof or disproof of some fact in issue is in the control of one party, but the burden at least of coming forward with evidence is upon the other. In such a case the party having the burden should be allowed the most free use of hearsay. This approach would give a shortcut past many difficult problems of admissions by agents, particularly in suits involving large corporations.<sup>41</sup>

Still another useful result of treating hearsay as a special case of secondary evidence would be the increased use of what is known as "past recollection recorded." Under existing law, records of past events made even by presently available witnesses can be used only to a limited extent unless the witness be willing to swear that on looking

at the memorandum his recollection of the past event is refreshed. By analogy to the use of copies to aid in reading mutilated or partly obliterated documents,<sup>42</sup> such memoranda or records should be directly available as evidence after full examination of the man who made them discloses that his recollection has become incomplete.<sup>43</sup>

Of course, it is not urged herein that hearsay should always be admitted. Where it is of virtually no value and merely consumes time, where it raises unduly long and difficult collateral issues, where it is unfair because highly prejudicial or because it is impossible to meet it by other evidence, in such cases it should be excluded, as other evidence should be excluded in like cases. But it should not be excluded *merely because it is hearsay* except where the party offering it could by reasonable effort and without depending on sources controlled by the opposite party have offered instead the declarant as a witness in his proper person.

#### IV.

The foregoing discussion has dealt exclusively with admissibility. The problem of the minimum quantum of evidence necessary to sustain a burden of proof on each ultimate issue has been avoided. In the opinion of the writer this is a problem for the trier of fact<sup>44</sup>

<sup>40</sup> Proceedings of the Thirty-Sixth Annual Meeting of the Association of American Law Schools (1939) 178.

<sup>41</sup> In addition, this analogy may aid in the general treatment of admissions under the hearsay rule.

<sup>42</sup> *Semble*, *Den ex dem Weatherhead v. Baskerville*, 52 U. S. 329 (11 How. 1850).

<sup>43</sup> Where the maker of the record was un-

available, of course the memorandum could be used.

<sup>44</sup> In jury cases, the problem in the first instance is for the judge to determine whether reasonable men could be convinced by the evidence, and later for the jury to determine whether it is convinced. In other than jury trials this initial division of function does not occur. However, in all cases the question arises on appeal, if not before, whether a finding of fact is supported by evidence.

after the record has been closed. Any attempt to anticipate this question of adequate probative force in ruling on the admissibility of an offer of evidence (except in determining whether the value of the proffered evidence justifies the time to be consumed in hearing it) can only lead to confusion and often to wrong decision.

On the other hand, once the question of admissibility has been passed upon it should be dismissed from consideration, leaving no echo to confuse the subsequent evaluation of probative force. To put it mildly, there is not a perfect correlation between the common law exclusionary rules and the probative value of evidence, and an attempt to weigh evidence in terms of its legal value, or any similar concept, can only confuse. To take a particular example, in *Eastlick v. Southern Railway Company*<sup>45</sup> a widow brought her action against the railway for the negligent killing of her husband. Plaintiff's witnesses, on cross-examination, recited what the defendant's locomotive engineer said immediately after the wreck. No objection was made to this evidence, and if the recitals were true the defendant was guilty of no negligence. The trial court non-suited plaintiff, but was reversed, the Georgia Supreme Court saying in part:

"There can be no question that the plaintiff, but for the testimony with respect to these declarations of the engineer, would have been entitled to go before the jury; for the evidence as to the cause of her husband's death, in connection with the legal presumption of negligence against the company, was sufficient to make out in her behalf a

prima facie case. Ought she to have been denied the privilege of having the jury pass upon the case merely because of the introduction of the hearsay testimony above pointed out? We think not. Such testimony, save as to well defined exceptions, is inadmissible for any purpose, because it is wholly without probative value. The fact that it is admitted can not give it any such value. In other words, testimony of this character which does not come within any of the exceptions just referred to is, in legal contemplation, wholly worthless, and has been so regarded and treated through all the ages of the English law. While a party who permits hearsay testimony to be introduced without objection, or who has himself introduced such testimony, will not be heard to complain of the fact that it went to the jury, and must suffer whatever disadvantage may come of their giving it sufficient weight to turn the scale against him when there is enough legal testimony before them to support a finding in favor of his adversary, it will not do to say that such a finding, resting upon hearsay testimony alone, can lawfully stand merely because the losing party did not object to such testimony when offered by his adversary, or himself introduced the same. No plaintiff should ever, under any circumstances, lose his case when there is evidence to warrant a recovery by him, and the verdict or judgment in favor of the opposite party has nothing upon which to rest but inadmissible hearsay testimony."

It should especially be noted that the court does not say that all hearsay not covered by one of the "well-defined" exceptions is really worthless, but that such testimony is *in legal contemplation* wholly worthless. This apparently means that even after evidence has been admitted without objection the court must pass upon its worth in terms of the rule of law which would have

<sup>45</sup> 116 Ga. 48, 42 S. E. 499 (1902).

applied if objection had been made rather than in terms of the actual apparent value of the particular offer in view of the circumstances of the particular case. The court is applying an irrebuttable presumption of the coincidence between admissibility at common law and probative value.

Such a decision is bad enough on appeal from common law trial. In the much criticized case of *Matter of Carroll v. Knickerbocker Ice Company*<sup>46</sup> the New York Court of Appeals took the same stand on an appeal from the workmen's compensation commission, which by statute was "not bound by common law or statutory rules of evidence" and might "make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." The award appealed from was on one essential point sustained only by recitals made by the injured workman immediately before his death. After reciting the controlling statute the majority opinion for the court said:<sup>47</sup>

"This section has plainly changed the rule of evidence in all cases affected by the act. It gives the workmen's compensation commission free rein in making its investigations and in conducting its hearings and authorizes it to receive and consider not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. The award of the commission cannot be overturned on account of any alleged error in receiving evidence. .

"This is all true, but, as I read it, section 68 as applied to this case does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the commission made. That section does not declare the

probative force of any evidence, but it does declare that the aim and end of the investigation by the commission shall be "to ascertain the substantial rights of the parties." No matter what latitude the commission may give to its inquiry, it must result in a determination of the substantial rights of the parties. Otherwise the statute becomes grossly unjust and a means of oppression.

"The act may be taken to mean that while the commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may in its discretion accept any evidence that is offered; still in the end there must be a residuum of *legal* evidence to support the claim before an award can be made. As was said by Justice Woodward in his able dissenting opinion at the Appellate Division: "There must be in the record some evidence of a sound, *competent* and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by (the) court." (Italics supplied.)

Such a decision goes little beyond the rule generally applied to non-jury trials, that on a record containing both competent and incompetent testimony, the decision will be presumed to have been based on the competent.

Here as in the Georgia case the court, while ruling that the mere admission of evidence incompetent at common law constitutes no basis for reversal, still assumed the common law rules of admissibility to be conclusive determinants of the probative value of the evidence received. Slight familiarity with the decisions dealing with "dying declarations," with "statements of physical condition" and with "spontaneous exclamations" is sufficient for appreci-

<sup>46</sup> 218 N. Y. 435, 113 N. E. 507 (1916).

<sup>47</sup> *Id.*, at 440.

ation of the naivete of this assumption in the very case presented.

Although the rule of the *Knickerbocker* case has been most effectively criticized,<sup>48</sup> a disturbing tendency to give it at least lip service may be observed even among those administrators who might be expected to oppose it most strongly. Thus Chairman Madden of the Labor Board in a recent address<sup>49</sup> has said, "It will readily be acknowledged that most hearsay testimony has little or no probative value," going on to justify its admission chiefly to develop leads toward competent evidence and suggesting that it may be worthy of independent reliance in but one somewhat unusual situation. While Chairman Madden's remarks are easily understandable in light of criticisms which have been directed at the Labor Board, it may be that in the long run a more aggressive position might prove wiser. Administrative tribunals have

but recently attained the importance in practical affairs which they hold today. It still remains for them to prove to many observers their utility and fairness. And if they must eschew a violent break with the judicial tradition to avoid the charge of injustice, they must also show enough freedom from arbitrary rules inherited from the past to substantiate their claims of efficiency. One way to the latter end will lie in a careful evaluation of existing rules of evidence to determine their underlying policy (where one exists), the extent to which that policy is applicable to the administrative technique, and above all, the extent to which that policy is in fact carried out by the formal rules of the litigious game as it exists today. For only by a judicious declaration of independence from precedent can these quasi-tribunals justify their existence.

<sup>48</sup> Wigmore, Evidence, §4 b (B) 5.

<sup>49</sup> Supra, note 40.